Docket for 05-51

(25)

No. 05-51
Title: Mario A. Bustillo, Petitioner
v.
Gene M. Johnson, Director, Virginia Department of Corrections
Docketed: July 7, 2005
Lower Ct: Supreme Court of Virginia
Case Nos.: (042023)
Decision Date: March 7, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 20 2005	Application (04A997) to extend the time to file a petition for a writ of certiorari from June 5, 2005 to August 4, 2005, submitted to The Chief Justice.
May 25 2005	Application (04A997) granted by The Chief Justice extending the time to file until July 5, 2005.
Jul 5 2005	Petition for a writ of certiorari filed. (Response due August 8, 2005)
Jul 7 2005	Waiver of right of respondent Gene M. Johnson, Director, Virginia Department of Corrections to respond filed.
Jul 20 2005	DISTRIBUTED for Conference of September 26, 2005.
Jul 25 2005	Response Requested . (Due August 24, 2005)
Aug 9 2005	Order extending time to file response to petition to and including September 23, 2005.
Sep 23 2005	Brief of respondent Gene M. Johnson, Director, Virginia Department of Corrections in opposition filed.
Sep 23 2005	Brief amici curiae of Republic of Honduras, et al. filed.
Oct 4 2005	Reply of petitioner Mario A. Bustillo filed.
Oct 5 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 6 2005	Letter of October 6, 2005, from counsel for petitioner received. (Distributed)
Oct 24 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	DISTRIBUTED for Conference of November 4, 2005.
Nov 7 2005	Petition GRANTED limited to Question 1 presented by the petition. This case is consolidated with No. 04-10566, Sanchez-Llamas v. Oregon, which is granted limited to Questions 1 and 2 presented by the petition, and a total of one hour is allotted for oral argument. VIDED.
Nov 21 2005	Motion for enlargement of time for oral argument, for divided argument, and for leave to participate in oral argument as amicus curiae. filed by the Solicitor General. VIDED.
Dec 8 2005	Consent to the filing of amicus briefs in support of either party received from counsel for petitionerSanchez-Llamas. VIDED.
Dec 12 2005	Motion enlargement of time for oral argument, for divided argument, and for leave to participate in oral argument as amicus curiae. GRANTED. The time is to be divided as follows: 45 minutes for the petitioners, 15 minutes for respondent in No. 04-10566, 15 minutes for respondent in No. 05-51, and 15 minutes for the Solicitor General as amicus curiae in support of respondents.
Dec 12 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent Johnson.
Dec 13 2005	Consent to the filing of amicus briefs in support of either party received from counsel for

	the petitioner, Bustillo. VIDED.
Dec 20 2005	Motion to dispense with printing the joint appendix filed by petitioners Moises Sanchez-Llamas. VIDED.
Dec 21 2005	Brief amici curiae of European Union and Members of the International Community filed. VIDED.
Dec 21 2005	Brief amici curiae of Ambassador L. Bruce Laingen, et al. filed VIDED.
Dec 22 2005	Brief amici curiae of Law Professors filed. VIDED.
Dec 22 2005	Brief amici curiae of Bar Associations, et al. filed. VIDED.
Dec 22 2005	Brief amici curiae of Former United States Diplomats filed. VIDED.
Dec 22 2005	Joint appendix filed.
Dec 22 2005	Brief of petitioner Mario A. Bustillo filed.
Dec 22 2005	Brief amicus curiae of American Bar Association filed.
Dec 22 2005	Brief amicus curiae of International Court of Justice Experts filed. VIDED.
Dec 22 2005	Brief amicus curiae of Association of the Bar of City of New York filed. VIDED.
Dec 23 2005	Brief amici curiae of Mid-Atlantic Innocence Project, et al. filed.
Dec 23 2005	Brief amici curiae of Republic of Honduras, and Other Foreign Sovereigns filed. VIDED.
Jan 9 2006	Application (05A624) of the Solicitor General for leave to file a consolidated amicus curiae brief in excess of page limits, submitted to The Chief Justice. VIDED.
Jan 10 2006	Extension of time within which to file respondent's brief on the merits to and including January 31, 2006. VIDED.
Jan 23 2006	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 23 2006	SET FOR ARGUMENT on Wednesday, March 29, 2006.
Jan 23 2006	CIRCULATED.
Jan 30 2006	Brief amicus curiae of Alliance Defense Fund filed. VIDED. (Distributed)
Jan 31 2006	Brief of respondent Gene M. Johnson, Director, Virginia Department of Corrections filed. (Distributed)
Jan 31 2006	Brief amicus curiae of United Statesl filed. VIDED. (Distributed)
Jan 31 2006	Brief amici curiae of Alabama, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Professors of International Law, et al. filed. VIDED. (Distributed)
Feb 9 2006	Motion for divided argument filed by petitioners. VIDED.
Feb 27 2006	Motion for divided argument filed by petitioner GRANTED.
Mar 7 2006	Reply of petitioner Mario A. Bustillo filed. (Distributed)
Mar 29 2006	Argued. For petitioner in N o. 04-10566: Peter Gartlan, Salem, Ore. For petitioner in No. 05-51: Mark T. Stancil, Washington, D.C. For respondent in No. 04-10566: Mary H. Williams, Oregon Solicitor General, Salem, Ore. For respondent in No. 05-51: William E. Thro, State Solicitor general, Richmond, Va; and Gregory G. Garre Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

No. 05-51 JUN 1 - 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

JOHN C. KIYONAGA
526 King Street
Suite 213
Alexandria, VA 22413
(703) 730-0009

JEFFREY A. LAMKEN
Counsel of Record
MARK T. STANCIL
MICHAEL G. PATTILLO, JR.
HEATHER M. MCCANN
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights.

2. Whether, in deciding if improperly withheld exculpatory evidence might have affected the outcome of the original trial and thus is "material" under *Brady* v. *Maryland*, 373 U.S. 83 (1963), a court may (a) refuse to consider the strength or weakness of the prosecution's evidence at the original trial; (b) analyze the potential effect of the withheld evidence on an item-by-item basis, rather than in the aggregate; (c) substitute its judgment for the likely effect on the jury by attempting to reconcile the exculpatory evidence with the original verdict; and (d) give determinative weight to the testimony of trial counsel that he was unsure whether the improperly withheld evidence would have affected the outcome of the trial.

3. Whether the Supreme Court of Virginia's refusal to hear petitioner's *Brady* claim on the ground that he did not file the transcripts of a hearing held during habeas corpus proceedings is an adequate and independent state ground of decision that precludes this Court's review of such claim.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the case in the Supreme Court of Virginia are named in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceedings Below	ii
Opinions Below	1
Jurisdiction	1
Constitutional And Treaty Provisions Involved	2
Statement Of The Case	2
I. Statutory Framework	4
II. Proceedings In This Case	5
A. The Murder Trial And Direct Review	5
B. Proceedings On State Habeas	8
1. The New Evidence And Vienna Convention Claims	8
2. The *Brady* Claim	9
C. The Supreme Court of Virginia's Decision	13
Reasons For Granting The Petition	13
I. This Court Should Address The Conflict Concerning The Proper Construction Of Article 36 Of The Vienna Convention	15
A. United States And International Courts Are In Disarray Over The Interpretation Of Article 36	15
B. The Vienna Convention Issues Have Overwhelming National And International Importance	20
C. Petitioner Was Severely Prejudiced By The Violation Of His Vienna Convention Rights	22

TABLE OF CONTENTS–Continued

	Page
II. The Virginia Courts' Denial Of Petitioner's *Brady* Claims Warrants Review	25
A. The Circuit Court's Ruling On Materiality Contravenes This Court's Precedents	25
B. The Supreme Court of Virginia's *Brady* Ruling Is Not Based On An Adequate And Independent State Ground	28
Conclusion	30
Appendix A (March 7, 2005, Supreme Court of Virginia order)	1a
Appendix B (May 4, 2004, Circuit Court opinion)	3a
Appendix C (May 4, 2004, Circuit Court order)	17a
Appendix D (September 16, 2003, Circuit Court opinion)	19a
Appendix E (February 21, 2003, Circuit Court order)	36a
Appendix F (August 8, 2002, Circuit Court opinion)	38a
Appendix G (August 8, 2002, Circuit Court order)	49a
Appendix H (constitutional and treaty provisions)	51a

TABLE OF AUTHORITIES

Page

CASES

Ademodi v. *State*, 616 N.W.2d 716 (Minn. 2000) 18

Bieregu v. *Ashcroft*, 259 F. Supp. 2d 342 (D.N.J. 2003) 18

Block v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967) 18

Brady v. *Maryland*, 373 U.S. 83 (1963) ..... *passim*

Breard v. *Greene*, 523 U.S. 371 (1998) 18, 19, 25

Breard v. *Pruett*, 134 F.3d 615 (4th Cir. 1998) 17

California v. *Hodari D.*, 499 U.S. 621 (1991) 22-23

Cardenas v. *Dretke*, 405 F.3d 244 (5th Cir. 2005) 16, 19

Carlton v. *Paxton*, 415 S.E.2d 600 (Va. Ct. App. 1992) 29

Case Concerning Avena and Other Mexican Nationals (Mex. v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) ..... *passim*

Cauthern v. *State*, 145 S.W.3d 571 (Tenn. Crim. App. 2004) 16

Commonwealth v. *Diemer*, 785 N.E.2d 1237 (Mass. App. Ct. 2003) 18

Conde v. *State*, 860 So. 2d 930 (Fla. 2003) 18

Darby v. *Hawk-Sawyer*, 405 F.3d 942 (11th Cir. 2005) 18

Garcia v. *State*, 17 P.3d 994 (Nev. 2001) 18

Gomez v. *Commonwealth*, 152 S.W.3d 238 (Ky. Ct. App. 2004) 16

TABLE OF AUTHORITIES—Continued

Page

Goodpasture v. *Goodpasture*, 371 S.E.2d 845 (Va. Ct. App. 1988) 29

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 28

Hohn v. *United States*, 524 U.S. 236 (1998) 19

Illinois v. *Wardlow*, 528 U.S. 119 (2000) 23

James v. *Kentucky*, 466 U.S. 341 (1984) 28

Kyles v. *Whitley*, 514 U.S. 419 (1995) 25, 26, 27, 30

LaGrand Case (F.R.G. v. *U.S.)*, 2001 I.C.J. No. 104 (June 27) ..... passim

Leka v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001) 30

Lopez v. *State*, 558 S.E.2d 698 (Ga. 2002) 18

Medellín v. *Dretke*, 544 U.S., 125 S. Ct. 2088 (2005) ..... *passim*

People v. *Hernandez*, 745 N.E.2d 673 (Ill. App. Ct. 2001) 18

People v. *Ortiz*, 795 N.Y.S.2d 182 (N.Y. App. Div. 2005) 18

People v. *Preciado-Flores*, 66 P.3d 155 (Colo. Ct. App. 2003) 18

Reed v. *Farley*, 512 U.S. 339 (1994) 20

Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) 19

Roe v. *Roe*, 324 S.E.2d 691 (Va. 1985) 29

Salmon v. *Commonwealth*, 529 S.E.2d 815 (Va. Ct. App. 2000) 29

Shackleford v. *Commonwealth*, 547 S.E.2d 899 (Va. 2001) 16

TABLE OF AUTHORITIES—Continued

Page

Standt v. *City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001) 17

State v. *Buenaventura*, 660 N.W.2d 38 (Iowa 2003) 18

State v. *Issa*, 752 N.E.2d 904 (Ohio 2001) 18

State v. *Jamison*, 20 P.3d 1010 (Wash. Ct. App. 2001) 18

State v. *Martinez-Rodriguez*, 33 P.3d 267 (N.M. 2001) 16

State v. *Navarro*, 659 N.W.2d 487 (Wis. Ct. App. 2003) 16

State v. *Sanchez-Llamas*, 108 P.3d 573 (Or. 2005) 16

Strickland v. *Washington*, 466 U.S. 668 (1984) 11

Strickler v. *Greene*, 527 U.S. 263 (1999) 25, 28, 30

Teague v. *Lane*, 489 U.S. 288 (1989) 20

Torres v. *Mullin*, 540 U.S. 1035 (2003) 19

Turner v. *Commonwealth*, 341 S.E.2d 400 (Va. Ct. App. 1986) 29

United States v. *Agurs*, 427 U.S. 97 (1976) 27

United States v. *Bagley*, 473 U.S. 667 (1985) 25

United States v. *Chaparro-Alcantara*, 37 F. Supp. 2d 1122 (C.D. Ill. 1999) 17

United States v. *De La Pava*, 268 F.3d 157 (2d Cir. 2001) 18

United States v. *Diaz-Carreon*, 915 F.2d 951 (5th Cir. 1990) 26

TABLE OF AUTHORITIES—Continued

Page

United States v. *Ellis*, 121 F.3d 908 (4th Cir. 1997) 30

United States v. *Emuegbunam*, 268 F.3d 377 (6th Cir. 2001) 4, 16, 17

United States v. *Hongla-Yamache*, 55 F. Supp. 2d 74 (D. Mass. 1999) 17

United States v. *Lawal*, 231 F.3d 1045 (7th Cir. 2000) 18

United States v. *Li*, 206 F.3d 56 (1st Cir. 2000) 17, 18

United States v. *Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) 17, 18

United States v. *Minjares-Alvarez*, 264 F.3d 980 (10th Cir. 2001) 18

United States v. *Santos*, 235 F.3d 1105 (8th Cir. 2000) 16, 18, 25

United States v. *Superville*, 40 F. Supp. 2d 672 (D.V.I. 1999) 17

United States ex rel. Madej v. *Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) 17

Wolfe v. *Commonwealth*, 371 S.E.2d 314 (Va. Ct. App. 1988) 29

Zavala v. *State*, 739 N.E.2d 135 (Ind. Ct. App. 2001) 18

TREATIES, STATUTES, AND RULES

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488:

Art. I, 21 U.S.T. 326 ..... 4, 5

TABLE OF AUTHORITIES—Continued

Page

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261:

Art. 36 ..... *passim*

Art. 36(1)(b) 4, 21

Art. 36(2) 4, 19, 21

28 U.S.C. § 1257(a) 2

Va. S. Ct. R. 5:11(b) 29

MISCELLANEOUS

115 Cong. Rec. 30,997 (1969) 4

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Mario A. Bustillo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App., *infra*, 1a–2a) is unreported. The May 4, 2004, decision of the Fairfax County Circuit Court (App., *infra*, 3a–16a) is unreported. The September 16, 2003, decision of the Fairfax County Circuit Court (App., *infra*, 19a–35a) is reported at 63 Va. Cir. 125 (Va. Cir. Ct. 2003); the February 21, 2003, decision of the Fairfax County Circuit Court (App., *infra*, 36a–37a) is unreported; and the August 8, 2002, decision of the Fairfax County Circuit Court (App., *infra*, 38a–48a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 7, 2005. On May 25, 2005, the Chief Justice extended the time for filing a petition for a writ of

certiorari to and including July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; the Due Process Clause of the Fifth Amendment to the Constitution, U.S. Const. amend. V; Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101; and the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, are set forth in the Appendix to the Petition at App., *infra*, 51a–55a.

STATEMENT OF THE CASE

The sole issue at petitioner Mario Bustillo's first-degree murder trial was *who* struck James Merry with a baseball bat at the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997. At trial, three witnesses said that petitioner, a Honduran national, committed the crime. Two eyewitnesses testified that petitioner was not the killer, and one identified a Honduran national nicknamed "Sirena"—now known to be Julio Osorto—as the man who struck and killed Merry. The day after Merry died, Sirena fled the country for Honduras. Since then, Sirena has admitted (and bragged) to friends, in surreptitiously videotaped conversations, that he was the one who struck Merry with a baseball bat.

At the time of trial, however, defense counsel could not locate Sirena and could not even present the jury with Sirena's true surname. Consequently, the Commonwealth mocked the defense theory that a "so-called Sirena" committed the crime; called Sirena's absence "convenient"; and questioned the credibility of the witness who saw him on a flight to Honduras the day after the victim's death. It now turns out that the Commonwealth had police reports showing that police officers stopped Julio Osorto—Sirena—near the crime scene shortly after the crime occurred; that